Supreme Court, U.S.
FILED
MAR 23 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1095

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOSEPH HOWE and DORIS LOUISE HOWE,

Appellants,

vs.

NORCHEK OF NEWPORT, INC., d/b/a WOODY'S WHARF; ROBERT KINNEY,

Appellees.

APPEAL FROM
THE COURT OF APPEAL OF CALIFORNIA,
FOURTH APPELLATE DISTRICT, DIVISION THREE

AMICUS CURIAE BRIEF BY MOTHERS AGAINST DRUNK DRIVING IN SUPPORT OF APPELLANTS' JURISDICTIONAL STATEMENT

LEONARD SHARENOW, ESQ.
Suite 340
10390 Santa Monica Boulevard
Los Angeles, California 90025
(213) 282-8300

Attorney for Amicus Curiae
MOTHERS AGAINST DRUNK DRIVING

Lawyers Brief Service / Legal Printers / (213) 383-4457 / (714) 720-1510

No. 88-1095

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOSEPH HOWE and DORIS LOUISE HOWE,

Appellants,

vs.

NORCHEK OF NEWPORT, INC., d/b/a WOODY'S WHARF; ROBERT KINNEY,

Appellees.

APPEAL FROM
THE COURT OF APPEAL OF CALIFORNIA,
FOURTH APPELLATE DISTRICT, DIVISION THREE

AMICUS CURIAE BRIEF BY MOTHERS AGAINST DRUNK DRIVING IN SUPPORT OF APPELLANTS' JURISDICTIONAL STATEMENT

LEONARD SHARENOW, ESQ.
Suite 340
10390 Santa Monica Boulevard
Los Angeles, California 90025
(213) 282-8300

Attorney for Amicus Curiae
MOTHERS AGAINST DRUNK DRIVING

TABLE OF CONTENTS

Page

STATEMENT OF INTEREST 2

ARGUMENT 2

CONCLUSION 17

TABLE OF AUTHORITIES

Page

Case Law

Chalup v. Aspen Mine Co.,
175 Cal. App. 3d 973,
221 Cal. Rptr. 97 (1985) 15

Kindt v. Kauffman,
57 Cal.App.3d 845 (1976) 16

Other Authority

Damkot, Alcohol Incidence
in Rural Drivers: Characteristics
of a Population and Clues for
Countermeasures, 9 Drug & Alcohol
Dependence 305, 322 (1982) 12

J. Mosher, I Liquor Liability Law
§1.04[2][B] at 1-18 (Matthew Bender
1987) 8

J. Mosher & L. Wallack, The DUI
Project: Description of an Experimental
Program to Address Drunk Driving
Problems 47 (1979) 13

National Highway Traffic
Administration, Fatal Accident
Reporting System 1987,
A Review of Fatal Traffic Accidents in
the U.S. in 1987 (1988) 2, 6

Ryan & Segers, San Diego County's
First Conviction Program
Population Description 13 (1983) . . 13

U.S. Dept of Just., Bur. of Just. Stat., Report to the Nation on Crime and Justice (March 1988) 5

Wolfe, 1973 U.S. National Roadside Breath Taking Survey, 4 Hit Lab Rep. 73 (Highway Safety Research Institute, Univ. of Mich. 1974) 12

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

No. 88-1099

JOSEPH HOWE and DORIS LOUISE HOWE,
Appellants,

v.

NORCHEK OF NEWPORT, INC. d/b/a WOODY'S WHARF; ROBERT KINNEY,
Appellees.

ON APPEAL FROM THE COURT OF APPEAL
OF
CALIFORNIA

AMICUS CURIAE BRIEF BY MOTHERS AGAINST DRUNK DRIVING IN SUPPORT OF APPELLANTS' JURISDICTIONAL STATEMENT

Mothers Against Drunk Driving, with the consent of both parties and at the

request of appellants, respectfully submits the following brief in support of appellants' jurisdictional statement.

STATEMENT OF INTEREST

More than 46,000 people die in vehicular crashes each year. National Highway Traffic Administration, Fatal Accident Reporting System 1987, A Review of Information on Fatal Traffic Accidents in the U.S. in 1987 (1988). Alcohol is involved in more than half these deaths: fifty-one percent of all fatalities involve alcohol, with forty percent involving blood alcohol levels of 10% or above, the most common standard for legal intoxication. In addition, over 560,000 injuries annually result from alcohol-related traffic crashes. Id.

In response to the unrelenting toll that drunk driving exacts from this country, day after day, month after month, year after year, Mothers Against Drunk Driving (MADD), a nationwide, non-profit organization, was formed in May, 1980. MADD's mission is to mobilize victims of drunk driving crashes and their allies to establish the public conviction that drunk driving is unacceptable and criminal, in order to promote corresponding public policies, programs, and personal accountability. MADD has now grown to approximately 400 chapters throughout the United States with more than 1,000,000 members and supporters.

MADD provides educational programs to the community, especially to teenagers, concerning the effects of

alcohol and driving; provides emotional support and criminal justice advocacy to victims of crashes; encourages programs on responsible business practices for commercial servers of alcohol; and testifies before state legislatures and Congress with respect to alcohol-impaired driving issues. MADD has been a key instigator in passing over 900 highway safety and alcohol-related laws across the United States. Thus, MADD has had considerable experience with the subject matter of Howe v. Norchek, civil liability of commercial servers of alcohol.

Given the enormity and severity of the drunk driving problem in this country, MADD believes this case is critical. Coherent policies must be

implemented to reduce alcohol-related death and injuries, and Howe v. Norchek concerns one of the most constructive solutions, commercial server civil liability.

ARGUMENT

Drunk driving is the most frequently committed crime in the nation today. U.S. Dept of Jus., Bur. of Just. Stat., Report to the Nation on Crime and Justice (March 1988). It kills people, it maims people, it injures people for life. The toll is heaviest upon the young: Traffic crashes are the number one cause of death and serious injury for those under twenty-five years of age; young people constitute approximately thirty-eight percent of the total 23,630 annual drunk driving deaths. National

Highway Traffic Administration, Fatal Accident Reporting System 1987, A Review of Fatal Traffic Accidents in the U.S. in 1987 (1988). Nine teenagers die, and hundreds of others are injured, every day due to drunk driving.

Appellants' son, Joseph Brandon Howe ("Joey"), was one of those young people. Joey was a normal, fun-loving and hard-working 20-year old in March of 1985, when a pick-up truck driven by Stephen Chase, hit him. Joey, riding his bicycle home from work, was killed. His parents, appellants, were devastated.

Chase had been drinking heavily that evening. Appellees, a bar at Newport Beach and a bartender at that bar, had served Chase substantial quantities of

alcohol even though Chase was obviously intoxicated when he entered the bar. Immediately prior to being served by appellees, Chase had been refused service at two other bars and ejected from a third. While Chase was drinking at appellees, Chase fell off the bar stool. Appellees continued to serve drinks to Chase even though they knew that Chase was so drunk he was not in responsible command of his own conduct. Appellees also knew that Chase would drive home from the bar. Despite the knowledge that Chase was intoxicated, that he was not in command of his own conduct, and that he would drive home, appellees continued to serve drinks to Chase solely for their monetary gain, without regard for the safety of the driving public.

This case, therefore, is critical in the development of coherent and effective public health and safety policies to reduce alcohol-related deaths and severe injuries. Howe v. Norchek focuses upon one method of decreasing the carnage wrought by drunk driving: encouraging commercial servers of alcohol to "turn off the tap" to potential drunk drivers by imposing civil liability upon them for illegally serving alcoholic beverages to persons who are obviously intoxicated.[1] This approach is well in keeping with ordinary principles of negligence and legal liability that

---

[1] Every state prohibits the sale of alcohol to obviously intoxicated persons. J. Mosher, I Liquor Liability Law §1.04 [2][B] at 1-18 (Matthew Bender 1987).

apply to other businesses in our society.

Based upon its experience in this area, MADD believes that commercial servers should, at the very least, be held liable to victims such as Joey and his parents for damages that result from the servers' illegal service of alcoholic beverages to those who are obviously intoxicated. This principle has been repeatedly recognized in recent court cases throughout the country and, appropriately applied, would serve as an effective deterrent to irresponsible service of alcoholic beverages, thereby greatly reducing the risk of drunk driving, while recognizing the rights of victims against such irresponsibility.

This case is crucial because it is before this Court on appeal, not on certiorari. Thus, this Court's ruling, even if merely a one sentence summary reversal or affirmance, will be definitive in all cases questioning the constitutionality of immunizing commercial servers from liability for their illegal service of alcoholic beverages to obviously intoxicated persons. Before taking such a fateful step, MADD implores this Court to consider the tragedy of drunk driving in this country and need for measures such as commercial servers liability, both as a safety measure and as a public health approach to the problem.

This case provides a text book example of the desirability of server liability as an incentive to encourage

responsible practices. Here, Chase, the drunken driver, evidently could not control whether or not he continued to drink. While he must be held accountable for his actions, those who provided the drinks bear responsibility for the results of his intoxication as well. If Chase was to have been stopped from drinking (and driving), the commercial servers -- the persons pouring the drinks -- would have to have exerted control. Insulated from liability, as commercial servers are under the statutes questioned by appellants, appellees had no reason to stop serving drinks to an obviously intoxicated individual. Their only incentive was the economic profit of continued drink sales to Chase.

Chase is not an isolated example. Studies indicate that most drunk drivers become intoxicated in places other than their own homes. Two roadside breath tests reported that approximately forty percent of those stopped who had blood alcohol levels of .10% or above were driving from bars or taverns. Damkot, Alcohol Incidence in Rural Drivers: Characteristics of a Population and Clues for Countermeasures, 9 Drug & Alcohol Dependence 305, 322 (1982); Wolfe, 1973 U.S. National Roadside Breath Taking Survey, 4 Hit Lab Rep. 73 (Highway Safety Research Institute, Univ. of Mich. 1974). An even greater percentage of those arrested than those convicted of driving under the influence had come from bars or

taverns. J. Mosher & L. Wallack, The DUI Project: Description of an Experimental Program to Address Drunk Driving Problems 47 (1979); Ryan & Segers, San Diego County's First Conviction Program Population Description 13 (1983). Studies also indicate that people who drink before driving often do so at sports events, airports, and large discos where alcohol is served. Id.

Since commercial servers of alcohol are the most common source of alcohol for impaired drivers, they are, likewise, in the best position to prevent intoxicated persons from causing harm to innocent victims. The commercial seller is the last person who can insure that the potential drunk driver does not become an actual drunk

driver by refusing to sell to him or her. Server training programs are offered by numerous training organizations. In addition, establishments can also support "designated driver" programs and offer free taxi rides for their patrons. If commercial servers and their insurers have an economic incentive to do so, bartenders can and will monitor the sobriety of patrons more carefully.

Solutions that only look to one-half of the supply and demand system cannot be effective. If persons who drive while drunk are to be held responsible, so must commercial servers who irresponsibly sell alcohol.[2] Fairness

---

[2] A perverse twist of California's statutory system establishes a truly unjustifiable treatment of victims. Had Joey, a

(continued...)

dictates that the commercial server, who benefits economically from every sale of alcohol, should also bear the burden which accompanies that benefit.

Criminal liability for serving obviously intoxicated persons is not enough. Although 22,000 establishments dispensed alcoholic beverages in California during 1974 and 1975, the California Department of Alcoholic Beverage Control filed only a total of 582 accusations over those two years for violation of serving obviously

---

[2](...continued)
minor, been served the drinks, become drunk, been involved in a car accident, and died, appellees would be liable. See Chalup v. Aspen Mine Co., 175 Cal. App. 3d 973, 221 Cal. Rptr. 97 (1985) (commercial servers may be liable to minors for serving them alcohol.) But because Joey was a truly innocent and sober victim, California allows appellees to evade their responsibility.

intoxicated patrons. Kindt v. Kaufman, 57 Cal. App. 3d 845, 873 n.10, 129 Cal. Rptr. 603 (1976). Obviously, large additional expenditures of people, money and time are needed if states are expected to police all of this country's bars. Moreover, criminal liability threatens only (however mildly) the individual bartender. It does not encourage the owners of the bar or drinking establishment to adopt policies concerning responsible serving procedures and to ensure they are followed. On the other hand, if civil liability is allowed to supplement criminal liability, it will encourage saloon keeper responsibility without requiring additional bureaucratic mechanisms or further burdens to the taxpayer.

Had civil liability for commercial servers existed in March 1985, it is possible that appellees would have acted responsibly and legally, and chosen not to serve alcoholic drinks to an obviously drunk man, who they knew would drive home from the bar.

Instead they would have "turned off the tap." If that had happened, perhaps Joey would be alive today.

CONCLUSION

In light of the serious and nationwide threat posed by drunken driving and the importance of commercial server liability as a means of combating this threat, amicus curiae Mothers Against Drunk Driving requests that this Court note probable jurisdiction of the appeal of this case or, in the alternative, reverse the

decision of the California Court of Appeal.

Respectfully submitted,

LEONARD SHARENOW
Suite 340
10390 Santa Monica Boulevard
Los Angeles, California 90025

Attorneys for Amicus Curiae
Mothers Against Drunk Driving